No. 11,894

IN THE

United States Court of Appeals

For the Ninth Circuit

PRINTING SPECIALTIES AND PAPER CONVERTERS UNION, LOCAL 388, A.F.L., and WALTER J. TURNER,

Appellants,

vs.

HOWARD F. LEBARON, Regional Director of the 21st Region of the National Labor Relations Board, on behalf of the National Labor Relations Board,

Appellee.

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

REPLY BRIEF OF APPELLANTS.

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Subject Index

Table of Authorities Cited

Cases

Texts

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REPLY BRIEF OF APPELLANTS.

THE GRAVAMEN OF THE UNFAIR LABOR PRACTICE CHARGES.

As the General Counsel concedes, the facts in the instant case are "substantially undisputed," (Br. p. 35). The only direct evidence relating to the factual situation involved herein in the entire record is an affidavit of Appellant Turner (R. 20-26).

The General Counsel admits that *"the pickets did not make overt or explicit threats of reprisal or force or promises of benefits."* (Br. 39). He had already stated on the record that the picketing involved herein "can be termed peaceful picketing." (R. 204). The General Counsel likewise does not take issue with the assertions by Appellants based upon the record that "the charge originally filed before the Board (R. 27-30) contains no reference to threats of reprisal or force or promise of benefit" (Op. Br. 66) and that *"the picketing in question did not materially affect or interfere with the normal business being conducted at those concerns* [the trucking concern and terminals company] and there was no intention on the part of the strikers to physically or otherwise obstruct the operations at those locations, or to picket any merchandise other than Sealright products." (Op. Br. 65).

While the General Counsel seeks to argue that the instant case is not "one where because of peculiar circumstances, such as were found to exist in the *Wohl* case, . . . it is impossible for appellants to publicize their legitimate grievances except by picketing the premises of employers who are not immediately concerned in the labor dispute" (Br. 27), he does not quarrel with appellants' adoption of the language from the Supreme Court opinion in *Bakery Wagon Drivers Local v. Wohl,* 315 U. S. at p. 775 to describe the factual situation now confronting this Court (Op. Br. 86), namely that:

> "The record in this case does not contain the slightest suggestion of embarrassment in the task of governance; there are no findings and no circumstances from which we can draw the inference that the publication was attended or likely to be attended by violence, force or coercion, or conduct otherwise unlawful or oppressive; and it is not indicated that there was an actual or threatened abuse of the right to free speech through the use of excessive picketing."

It might also be said here, as in the *Wohl* case, without disagreement arising that "*. . . the means here employed and contemplated . . . are such as to have slight, if any, repercussions upon the interests of strangers to the issue. . . .*" (315 U. S. at p. 776). The General Counsel contends however that "Whether employees of the neutral employer engage in a total strike or in a 'product boycott,' the effect upon the free flow of commerce is the same, differing only in degree." (Br. 34).

The gravamen of the charge of unfair labor practices being prosecuted by the General Counsel against the appellants, then, consists of peaceful picketing in the course of which striking members of the labor organization advised employees of non-struck concerns that Sealright products were manufactured under strike conditions and for substandard wages, and requested them not to handle Sealright goods.

THE ESSENCE OF APPELLEE'S LEGAL POSITION.

The issues have been considerably narrowed due to the position taken by the General Counsel in his brief for the Appellee Regional Director.

In our Opening Brief, we cited and discussed numerous authorities of the Supreme Court of the United States upholding peaceful picketing pursuant to a legitimate labor dispute directed at the premises of the employer or at the products of the employer as the exercise of constitutional rights under the First Amendment. We then argued to this Honorable Court of Appeals for the Ninth Circuit that:

> "Section 8(b)(4)(A) must, under these same Supreme Court decisions, be declared invalid on its face, unless peaceful picketing under the circumstances herein is deemed excluded from its terms by the immunizing language of Section 8(c). The District Court in the instant case failed to give Section 8(c) any effect whatsoever or to rule as to its applicability to Section 8(b)(4)(A) . . ." (Op. Br. 61).

Responding to this argument, the General Counsel states:

> "The language of Section 8(b)(4)(A), in view of the phrase 'under any provisions of this Act' contained in Section 8(c) must, we think, be read in conjunction with the latter provision. But this does not mean that picketing, such as conducted here, is withdrawn from the proscription of Section 8(b)(4)(A)." (Br. 35-36).

Again with reference to our reliance upon the Fifth Amendment's guaranty of due process, he answers:

> "Section 8(b)(4)(A) must be read in conjunction with Section 8(c) of the statute. So read, Section 8(b)(4)(A) provides that it shall be an unfair labor practice for a labor organization to engage in a strike or to induce or encourage *by threats of reprisal or force or promise of benefit,* the employees of any employer to engage in a strike or concerted refusal, *et cetera.*
>
> "Assuming for the sake of argument that Section 8(b)(4)(A) standing alone might be invalid because of vagueness, the addition of the italicized qualification plainly leaves no room for doubt as to its meaning. . . ." (Br. 34-35).

Having conceded that the expression of views, argument, or opinion which contain no threat of reprisal or force or promise of benefit (such as statements of the Sealright strikers concerning the facts of the labor dispute with their employer) cannot constitute or serve as evidence as a violation of Section 8(b)(4)(A), the General Counsel argues that peaceful picketing in connection therewith is not immunized because it is a "coercive technique" (Br. 7), or in the language of the District Court a "forcible technique" (Br. 36).

Moreover, according to the General Counsel "Picketing constitutes an appeal to all working people to make common cause with the picketing group. Implicit in such an appeal is the promise that if the workers to whom the appeal is directed respond to

the appeal the union or workers making the appeal will, in turn, if the occasion should arise, lend similar support to the workers whose assistance and cooperation is sought. Conversely, the appeal carries with it the threat that if it is ignored the union or workers making the appeal will, whenever the occasion arises, refuse to support those workers who fail to cooperate." (R. 37).

Contrary to the leading decisions of the Supreme Court of the United States, *the General Counsel contends in essence that peaceful picketing is not an exercise of Free Speech, unless confined to the immediate vicinity of the premises of "the employer or company whose employees are directly involved in a labor dispute."* (Br. 17).

I.

WHILE PICKETING ACTIVITIES ARE NOT IMMUNE FROM ALL REGULATION, APPELLEE HAS FAILED TO BRING SECTION 8(b)(4)(A) WITHIN THE ALLOWABLE AREA OF GOVERNMENTAL CONTROL.

In our Opening Brief, it was expressly pointed out that the District Court herein had relied on a partial quotation from Mr. Justice Douglas in the *Wohl* case, *supra,* to the effect that the non-speech aspects of picketing "make it the subject of restrictive regulation" without giving any weight to the qualifying language immediately following in the quoted opinion, that ". . . since 'dissemination of information concerning the facts of a labor dispute' is constitution-

ally protected, a State is not free to define 'labor dispute' so narrowly as to accomplish indirectly what it may not accomplish directly." (Op. Br. 67-68, referring to 315 U. S. at p. 776).

We also referred to a similar partial quotation from the *Thornhill* case where the Court recognized "the power of the State to set the limits of permissible contest open to industrial combatants." The Court quickly added in its opinion that "It does not follow that the state in dealing with the evils arising from industrial disputes may impair the effective exercise of the right to discuss freely industrial relations which are matters of public concern." (Op. Br. 68, quoting 310 U. S. at p. 103).

Nevertheless, *the Brief for Appellee indulges in these same elliptical quotations,* of the type employed by the District Court herein, and used by various anti-picketing opinions and briefs to distort the authority of the *Wohl* and *Thornhill* cases identifying peaceful picketing with free speech (Br. 22, 24 and 26).

The fallacy of applying this ellipsis is borne out by Professor Armstrong in her article entitled *"Where Are We Going with Picketing?,"* published in the March, 1948, issue of the California Law Review. The article quotes the *caveat* from the *Thornhill* opinion and comes to the conclusion that "the rights of employers and employees to conduct their economic affairs" which the Supreme Court says are "subject to modification or qualification" as "an instance of the power of the State to set the limits of permis-

sible contest open to industrial combatants" concern "activities other than speech activities," or in other words, "the nonspeech aspects of picketing," where there is danger of physical destruction of property or injury to person through violent conduct (36 Calif. L. Rev. 1, at pp. 12, 13). Professor Armstrong brands the use of this first paragraph standing alone as "a clear *misuse* of the quotation from the *Thornhill* case" since the quotation "was followed by a paragraph that made its boundaries clear." (36 Calif. L. Rev. at p. 24).

In the same fashion, the General Counsel cites a dictum from the *Ritter's Cafe* case out of context as authority for the proposition that the injunction against picketing in the present case is valid because "Appellants are left free to use the 'traditional modes of communication' other than picketing the business places of neutral employers, such as L. A., Seattle and West Coast, for the purpose of publicizing their grievances with their real adversary, namely Sealright." (Br. 26-27).

Actually, the nature of Sealright products—milk bottle caps and paper food containers—causes them to lose their identity as to place of manufacture before reaching the ultimate consumer on milk bottles or as food packages bearing the trade names of various dairy companies or food products corporations. The District Court injunction forbidding appellants from following the subject matter of the dispute, set apart a particular enterprise—Sealright—and freed it from

all effective picketing in the same fashion as the New York injunction in the *Wohl* case, of which Mr. Justice Douglas said:

> "If the principles of the *Thornhill* case are to survive, I do not see how New York can be allowed to draw that line."

Moreover, the General Counsel ignores the pronouncement of the High Court in *Schneider v. New Jersey,* 308 U. S. 147, 163, 60 S. Ct. 315, 89 L. Ed. 430 that——

> ". . . the streets are natural and proper places for the dissemination of information and opinion; and one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place."

(See the very recent case of *Saia v. New York,* 334 U. S. 558, 68 S. Ct. 1148, 92 L. Ed. 1087.)

He also ignores the specific reference in the *Thornhill* case to this same doctrine, found at 310 U. S., p. 106.

In contending that Congress can proscribe picketing "for an unlawful purpose", (Br. 27-34 the General Counsel chooses to ignore the detailed argument of our Opening Brief citing cases in support of the proposition that picketing for a purpose reasonably related to employment conditions and the objects of collective bargaining is picketing for a *lawful purpose* protected by the Constitution (Op. Br. 48-52). His effort to uphold a statute forbidding picketing on the

ground that the same statute embodies a declaration that the purpose of such picketing is illegal amounts to nothing more than begging the question. Or, as the Supreme Court of California put it in the *Blaney* case (discussed at length in our Opening Brief and again *infra*), "the question still remains as to what purposes or means may be declared unlawful by the Legislature or the courts without violating the provisions of the Constitution."

This entire phase of the case may be summarized by briefly quoting from the *Carlson* case, 310 U. S. at 113:

> "The power and duty of the State to take adequate steps to preserve the peace and protect the privacy, the lives, and the property of its residents cannot be doubted. But the ordinance in question here abridges liberty of discussion under circumstances presenting no clear and present danger of substantive evils within *the allowable area of State control.*"

II.

THE ARGUMENT CLEARLY SET OUT IN OUR OPENING BRIEF, SUPPORTED BY ALL THE CONTROLLING AUTHORITIES, TO THE EFFECT THAT THE PICKETING IN THE CASE AT BAR IS THE EXERCISE OF A CONSTITUTIONAL RIGHT IS NOT REFUTED OR EVEN ANSWERED IN THE BRIEF OF APPELLEE.

At page 43 of our Opening Brief we quoted the language used by the attorney for Appellee at the oral argument in which he stated that the *Ritter's*

Cafe case holds that peaceful picketing and peaceful boycott should be limited to a dispute between an employer and his own employees.

We pointed out in our Opening Brief, at page 46, that *Bakery Wagon Drivers Local v. Wohl,* 315 U. S. 769, 62 S. Ct. 816, 86 L. Ed. 1178, holds that picketing of a struck employer is within the constitutional guarantee of free speech.

On the same page we quote the language of the learned trial court (R. 111), resting his decision in support of the injunction on the *Ritter's Cafe* case, 315 U. S. 722, 62 S. Ct. 807, 86 L. Ed. 1143, which he stated prohibited picketing of the character found in the case at bar as a "forcible technique."

Counsel for appellee makes the bald statement (Br. 27) that this is not a case similar to *Cafeteria Employees Union v. Angelos,* 320 U. S. 293, 64 S. Ct. 126, 88 L. Ed. 58, or *A.F. of L. v. Swing,* 312 U. S. 321, 61 S. Ct. 568, 85 L. Ed. 855.

The five-to-four decision in the *Ritter's Cafe* case, if Shepard's Citator is correct—and it generally is—has *never once* been cited by the Supreme Court of the United States. The unanimous decision in the *Wohl* case, which upholds as a constitutional right the picketing of the product of a struck employer—the exact type of picketing involved in the case at bar—has, on the other hand, been repeatedly cited. And the most significant citation of the *Wohl* case is the one found in the *Ritter's Cafe* case itself where the majority of the court, in limiting the right of

picketing, made it clear (315 U. S. at p. 727) that they were not in any way limiting or abridging the rule in the *Wohl* case, which upholds the right of the union "in following the subject matter of their dispute." It is very significant that when the *Ritter's Cafe* case is cited in an argument against the constitutional right of peaceful picketing, page 727 is *always omitted.*

To boil the argument down: We have the clear, manly and frank statement of Counsel for the Appellee that the intent of the Taft-Hartley Act is to limit peaceful, economic action by a union to a dispute between an employer and his own employees, and in order to prevail on this appeal that argument must be pressed to its limit. On the other hand, we have the language of *A. F. of L. v. Swing, supra,* decided *before* the *Ritter's Cafe* case and the same language repeated in *Cafeteria Employees Union v. Angelos* decided *after* the *Ritter's Cafe* case holding that the constitutional right of boycott and picketing cannot be abridged "by drawing the circle of economic competition between employers and workers so small as to contain only an employer and those directly employed by him." It is clear, therefore, that we have here a conflict between the General Counsel of the National Labor Relations Board and the Supreme Court of the United States. Counsel for the Appellee say (Br. 17) that peaceful picketing may be limited to a dispute between an employer and his own employees. The Supreme Court of the United States in two leading cases (the *Swing* and *Wohl* cases) holds

specifically and in language so plain that it cannot possibly be misunderstood that this is precisely what courts or legislatures *cannot do.* The duty of this Court, therefore, is clear, namely, to follow the unequivocal ruling of the Supreme Court of the United States and hold that the right of primary boycott and of picketing pursuant thereto includes the right to follow the product of the struck employer.

There has been a great deal of nonsense uttered and urged with regard to the type of picketing involved in the case at bar. In this portion of the argument we shall follow the method of the Restatement of Torts and avoid the use of the word "boycott." Instead, we will use the language of the Supreme Court of the United States and call this activity the following by the union of the subject matter of the dispute. We have strong authority in decisions of the Supreme Court of California in support of this right by a union. In the *Fortenbury* case, 16 Cal. (2d) 405, 106 P. (2d) 411, cited in our Opening Brief, the Supreme Court of California held that one who handles the product of a struck employer becomes an ally,—*not a neutral, but an ally.* And the Supreme Court of the United States, in *Milk Wagon Drivers v. Meadowmoor Dairies,* 312 U. S. 287, 61 S. Ct. 552, 85 L. Ed. 836, 132 A.L.R. 1200, first describes the acts prohibited as involving interference "with the sale of plaintiff's products by picketing stores where its products were sold," all of this having been accompanied by extreme violence over a considerable period of time. The decision of the Supreme Court in that case upheld the

injunction against picketing solely on the ground of violence, and the Court pointed out (at page 298) that the injunction should continue only during the continuance of the violence or the immediate threat of violence.

When we look at the issue before us objectively and with an unprejudiced eye, we see that what the General Counsel seeks to prohibit under the language of the Taft-Hartley Act is the following by a striking union of the subject matter of the dispute. We see that precisely this form of activity was upheld by the Supreme Court of the United States in the *Meadowmoor* case so long as only peaceful picketing is employed. That this activity is upheld by the Supreme Court of the United States in the *Wohl* case in a unanimous decision where picketing was peaceful, and lest there should be any doubt in anybody's mind, the court again, in the *Ritter's Cafe* case, decided on the same day, repeated and upheld the rule in the *Wohl* case.

These are rulings of the Supreme Court on the identical objective state of facts which we find in the case at bar.

Now if we join issue with the broader contention of the Appellee here as stated by counsel and cited above that the intent of the Taft-Hartley Act and of the Appellee in this case is to strike down the right of peaceful picketing, except in a dispute between an employer and his own employees, we find this theory categorically denied and disapproved by the Supreme Court in the *Swing* and *Angelos* cases, cited *supra.*

III.

APPELLEE HAS FAILED TO RECOGNIZE THAT THE ANTI-BOYCOTT RESTRICTIONS HELD UNCONSTITUTIONAL IN THE BLANEY CASE BY THE SUPREME COURT OF CALIFORNIA FOLLOWING THE CONTROLLING DECISIONS OF THE SUPREME COURT OF THE UNITED STATES ARE THE SAME AS THOSE OF SECTION 8(b)(4)(A).

Appellee has completely disregarded the sound reasoning of the California Supreme Court in the *Blaney* case, 30 Cal. (2d) 643, 184 P. (2d) 893, cited repeatedly in our Opening Brief. The significance of this recent holding as applied to the constitutional issues raised by Section 8(b)(4)(A) has been clearly noted by legal scholars.

In the January, 1948, issue of the Michigan Law Review at pages 435-436, the writer comments in the following fashion:

> "Perhaps the most interesting feature of this case is that the reasoning of the court seems to apply equally as well to the language of Section 8(b)(4)(A) of the Labor Management Relations Act of 1947 (the Taft-Hartley Act). This section of the new federal labor statute brands as an unfair labor practice and makes enjoinable inducement or encouragement of a strike or refusal to handle certain goods where an object thereof is to force or require an employer to cease doing business with any other person. Both 'hot goods' and 'secondary' boycotts are covered by the language of the section and the prohibitions upon inducement or encouragement of such action seems to cover picketing or other publication of the facts of a labor dispute which seeks to bring about such a boycott. The California court in the instant

> case, in declaring such inducement or encouragement by picketing to be within the area of free speech, is strictly in line with the Supreme Court picketing cases since 1940, and the conclusion seems inescapable that, barring a repudiation of its previous decisions or a drastic 'reading down' of the terms of the Taft-Hartley Act, the Supreme Court will declare invalid section 8(b)(4)(A) when it is called upon to adjudicate the constitutionality of that section."

See also 21 So. Cal. Law Review, pp. 76-92, December 1947.

Following the issuance of the Memorandum Opinion by the District Court in the instant case on February 3, 1948 (75 F. Supp. 678), the Supreme Court of California reaffirmed the principles of the *Blaney* decision in *Simons Brick Co. v. United Brick, Tile and Clay Workers,* 32 A.C. 176, handed down on June 29, 1948, without dissent.

IV.

WHILE THE GENERAL COUNSEL HAS RETREATED FROM HIS FORMER POSITION THAT AN INJUNCTION MUST ISSUE UNDER SECTION 10(1) UPON THE FILING OF A CREDIBLE PETITION BY THE REGIONAL DIRECTOR, THE DISTRICT COURT APPLIED THAT UNTENABLE RULE HEREIN.

At the argument below, the attorney for the General Counsel took the position that ". . . we do not have to show, as we see it, . . . irreparable harm, as is usually the case . . . in an equity proceeding. . . . We would have to make a showing by testimony that

the Regional Director does have reasonable cause. . . . The court still does have the question of determining whether or not the Regional Director does have reasonable cause to believe that a violation has been committed." (R. 201-203, cited at Br. 46). This view was accepted by the District Court which held that ". . . the specific injunctive processes expressly conferred upon this court by Section 10(1) of the Act become operable upon the credible petition of the administrative agency as provided in the Act." (R. 106).

Now, the General Counsel would disavow the position which he successfully persuaded the District Court to adopt, stating, "The Act itself, of course, does not impose an absolute duty upon a district court to grant injunctive relief pursuant to Section 10(1) merely upon a showing that there is reasonable cause to believe that unfair labor practices as charged are being committed." (Br. 47).

The conflict of this ancillary function conferred upon the District Court by Section 10(1) with the "separation of powers" defined by Article III of the Constitution becomes apparent in this case. An injunction was issued by the District Court on February 16, 1948, following a holding that "the picketing activities, which prompted the representatives of the Board to petition the court for injunctive relief, can in truth hardly be said to have been motivated by 'dissemination of information concerning the facts of a labor dispute.'" (R. 111). As pointed out by the General Counsel himself in a speech quoted in our

Opening Brief, the Trial Examiner who shortly thereafter heard the charges upon which the injunction was based, came to a contrary conclusion as to the *law of the case* (Br. 17), holding that such peaceful picketing is protected by the First and Fourteenth Amendments, as well as embraced within the language of Section 8(c) of the amended Act, and recommended that the complaint be dismissed by the Board in its entirety.

No such situation could arise whereby the administrative agency might in effect reverse the conclusions of law of the District Court under those statutes permitting judicial enforcement of an administrative subpena or judicial enforcement of a final administrative order, relied upon by Appellee as comparable to Section 10(1) (Br. 45).

Dated, September 15, 1948.

Respectfully submitted,

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